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MCGIRVANMEDIA (ASIA) SDN BHD v. HSS INTEGRATED SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
SU TIANG JOO JC
[CIVIL SUIT NO: WA-22NCvC-817-12-2020]
B 10 OCTOBER 2023

Abstract – *In deciding whether to recuse a judge from hearing a case, the court should be vigilant in not allowing parties to do judge-shopping by way of recusal application. The judges should balance properly their competing duties as judges; to adjudicate cases allotted to them properly, it should only be displaced when there are objectively justifiable grounds for recusal.*

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CIVIL PROCEDURE: *Judge – Recusal – Test to be applied – Real danger of bias – Allegation of familial relationship – Whether familial relationship 'must be so close and direct' – Whether familial relationship alleged was distant – Whether there was absence of direct or indirect pecuniary interest – Whether assertion of real danger of bias baseless and misconceived – Whether comments made on nature of case during case managements indicated judge 'prejudged' issues – Judges' Code of Ethics, s. 7(2)*

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The action herein had undergone two days of trial before another judge and subsequently was taken over by Justice Su Tiang Joo ('Justice Su'). At the first case management before him, Justice Su had made a disclosure to counsel for both the parties that one of his nieces was related by marriage to the son of one of the principal officers who was connected to the defendant company. Justice Su had taken the Constitutional Oath of office and the familial relationship was not close. Justice Su had also informed that he had no financial dealings at all with the principal officer and the defendant company. Nevertheless, the plaintiff requested for Justice Su to recuse himself and later, filed a formal recusal application (encl. 50). The application was grounded upon the assertions of the existence of a familial relationship and that Justice Su had sought to see the representatives of the plaintiff in person and that he had taken a keen interest in the action because, immediately after his transfer, and before the trial had recommenced, Justice Su had read the file. The defendant opposed the recusal application.

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Held (dismissing application with costs):

(1) The test to be followed in a recusal application is whether there is a real danger of bias and not actual bias. The familial relationship, as asserted by the plaintiff, 'must be so close and direct' as set out under s. 7(2) of the Judges' Code of Ethics. Based on the definition under s. 3 of the same Code, it was clear that the familial relation under discussion did

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not make the father-in-law of one of Justice Su's nieces, a member of his family. In fact, given the disclosure made by Justice Su, the plaintiff was (initially) not minded to apply to have him recused. By this, the clear inference was that the plaintiff had accepted that the familial relationship under discussion, was not close but in fact, distant. Not only was the familial relationship distant, Justice Su had no pecuniary interest in the defendant both directly or indirectly. (paras 10, 14-16 & 18)

(2) It was also the assertion of the plaintiff's counsel that she was informed by the court's interpreter, Ms Yogespari, that Justice Su sought a meeting with the plaintiff's client before the filing of the recusal application. However, Ms Yogespari denied having told the plaintiff's counsel that Justice Su had wanted to see her client. She said that she told her Justice Su wanted to see lead counsel. Throughout her many years of tenure in court, she was aware that judges will only see the parties if they attend for purposes of court-assisted-mediation sessions. In the circumstances, the apprehension of the 'plaintiff client', *ie*, the plaintiff, that Justice Su had wanted to see the plaintiff's representative, which formed its ground for the assertion of there being a real danger of bias, was baseless and misconceived. (paras 23 & 26-28)

(3) It is expected, as a matter of course, that judges read their files beforehand. This, judges do on a regular basis before and after regular office hours, during weekends, public holidays and when they are on annual leave, so as to cope with the relentless volume of case load. Section 7(4) and (7) of the Judges' Code of Ethics 2009 enjoins judges to dispose of all his judicial duties, fairly, efficiently, diligently and promptly and to hear and complete cases in his court and promptly write his judgments. That the judges are expected to read the files before hearing any matter was also agreed by the plaintiff's counsel, thus calling into question the *bona fides* of the recusal application. (paras 32 & 34)

(4) The matter was called up by way of case management premised upon O. 34 r. 1(b) of the Rules of Court 2012 which provides, *inter alia*, that the court may, at any time after the commencement of proceeding, of its own motion make such order or directions as it thinks fit as to the future course of the action as appear best adapted to secure the just, expeditious and economic disposal of the action. Comments made on the nature of the cases that come before the courts during case managements are not unusual and 'such comments and or preliminary views can by no means suggest that the judge has 'prejudged' the issues.' To take issue with the comment and to rely upon it as a ground for the recusal application portrayed a poor grasp of the mechanics of due process in the administration of justice in modern legal proceedings under the

overarching need for cases to be disposed of justly, expeditiously and economically (*Dato Sri Andrew Kam Tai Yeow v. Hoong Bee Yok*) (paras 36, 39, 41 & 43)

(5) The recusal application had failed the real danger of bias test. The grounds relied upon were not only misconceived but frivolous and disrespectful. The plaintiff's recusal application was without merit. (para 44)

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. Y C Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***

British Steel Corporation v. Cleveland Bridge & Engineering Co Ltd 24 BLR 94 ***(refd)***

Che Minah Remeli v. Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors [2008] 3 CLJ 653 CA ***(refd)***

Comptroller Of State Sales Tax, Sarawak & Anor v. Petroliam Nasional Bhd (Petronas) [2020] 3 CLJ 858 HC ***(refd)***

Dato' Sri Andrew Kam Tai Yeow v. Hoong Bee Yok [2019] 1 LNS 1298 HC ***(refd)***

Dato' Sri Mohd Najib Hj Abd Razak v. PP & Other Appeals (No 3) [2022] 8 CLJ 387 FC ***(refd)***

Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC ***(refd)***

Deleum Primera Sdn Bhd v. Mazrin Ramli & Ors [2021] 1 LNS 488 HC ***(refd)***

Ho Wei Yap & Anor v. Ho Kim Ling & Anor [2020] 1 LNS 2106 HC ***(refd)***

Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(refd)***

Jewish Family and Child Service of Greater Toronto v. JZ [2014] OJ No 1659 ***(refd)***

Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] 1 All ER 65 ***(refd)***

Loh Mui Fah v. Dr Selvakumar Thirunavukarasu & Ors [2015] 8 MLJ 800 ***(refd)***

Low Tin Yong v. Low Yong Thuan [2016] 5 CLJ 217 CA ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Michael Chow Keat Thye & Anor v. Suruhanjaya Sekuriti Malaysia [2013] 10 CLJ 505 HC ***(refd)***

Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(refd)***

Ngoo Sing Chong v. Ngoo Sing Chai & Ors [2022] 1 LNS 819 HC ***(refd)***

Pembinaan BLT Sdn Bhd v. Debessa Development Sdn Bhd [2014] 1 LNS 1348 HC ***(refd)***

PP v. You Poh Khoon [2022] 1 LNS 1371 HC ***(refd)***

Residence Hotel and Resorts Sdn Bhd v. Seri Pacific Corp Sdn Bhd [2014] 10 MLJ 413 ***(refd)***

Wong Kie Chie & Ors v. Kathryn Ma Wai Fong & Anor And Other Appeals [2017] 5 CLJ 707 CA ***(refd)***

You Poh Khoon v. PP [2023] 7 CLJ 1 CA ***(refd)***

Legislation referred to:

Judges' Code of Ethics, ss. 3, 7(2), (4), (7)

Rules of Court 2012, O. 34 r. 1(b)

For the plaintiff - Sumitha Gnanarajah & Hirasini Mahandran; M/s Yahya Anne Assocs

For the defendant - Wong Hock Mun & Eng Kar Wei; M/s Azim, Tunku Farik & Wong

Reported by S Barathi

JUDGMENT

Su Tiang Joo JC:

> "It is a fundamental principle that a judge should resist the temptation to yield to pressure to recuse himself if there is no valid or sufficient ground for recusal"*
>
> "He would be wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance"**

Introduction

[1] In the action before this court, the plaintiff claims for, *inter alia,* services rendered whereas the defendant counterclaims for, *inter alia,* unsatisfactory works provided. Underlying the dispute is, whether there is a concluded contract between the parties. The action had undergone two days of trial in February 2023 before Justice Ahmad bin Bache. On 1 March 2023, Justice Su Tiang Joo ("Justice Su") was transferred to this court with Justice Ahmad bin Bache transferred to the criminal division.

[2] Justice Su had at the first case management of the case before him on 17 March 2023 made disclosure to learned counsel for both the parties that one of his nieces is related by marriage to the son of one of the principal officers who is connected to the defendant company. To what extent, Justice Su was not clear. This was made clear in an affidavit (encl. 53 para. 8(b)) affirmed on behalf of the defendant company that this principal officer is a co-founder of the defendant company but does not hold the role of Chairman contrary to the assertion made by the plaintiff. Learned counsel for both parties were told that Justice Su had taken the constitutional oath of office, and that the familial relationship is not close.

[3] During the case management on 29 March 2023, Justice Su informed both learned counsel that he has no financial dealings at all with this principal officer and the defendant company. Nevertheless, learned counsel for the plaintiff requested for Justice Su to recuse himself. However, learned counsel for the defendant said it will be remiss of him if he does not object and will respond as and when an application for recusal is filed. Five dates in November 2023, March and April 2024 were then taken for continued trial. Thereafter, a formal recusal application (encl. 50) was filed with an added prayer that in the interim all proceedings be stayed ("recusal application").

[4] After hearing the parties, I dismissed the recusal application and these are the grounds of judgment for the decision made.

Recusal Application (Encl. 50)

[5] The recusal application is grounded upon the assertions contained in the plaintiff's affidavit in support (encl. 51) affirmed by Devin Nair a/l Sekaran Nair who is the chief executive officer of the plaintiff ("Devin Nair"), and a further affidavit in support (encl. 52) affirmed by Sumita

Gnanarajah, an advocate and solicitor and who is learned counsel for the plaintiff. The defendant filed an affidavit in response (encl. 53) deposed by Prakash Selvaratnam, and which elicited a reply by way of affidavit affirmed by Devin Nair (encl. 54).

[6] Besides asserting the existence of a familial relationship, the plaintiff asserted that Justice Su had sought to see the representatives of the plaintiff in person and that he has taken a keen interest in the action because immediately after his transfer, and before the trial has re-commenced, Justice Su has read the file. The defendant opposed the recusal application.

[7] Written submissions were filed by the plaintiff (encl. 61) and by the defendant (encl. 60) with oral submissions presented by both learned counsel for the plaintiff and defendant on 27 July 2023.

Court's Analysis And Findings

Obligation To Resist Temptation To Recuse

[8] *It is a fundamental principle that a judge should resist the temptation to yield to pressure to recuse himself if there is no valid or sufficient ground for recusal, as per Christopher Chin Soo Yin JC in *Comptroller Of State Sales Tax, Sarawak & Anor v. Petroliam Nasional Bhd (Petronas)* [2020] 3 CLJ 858 at para. [8] quoting from a lecture on "judicial recusal" given by Tan Sri Idrus Harun FCJ (later AG) in April 2019 at an induction course for prospective Judicial Commissioners prior to each of them taking their oath of a Judicial Commissioner.

[9] There is a strong presumption of judicial impartiality and that presumption is deeply rooted in our legal system, as per Abdul Malik Ishak JCA who wrote a separate judgement after dismissing the oral application of the appellant to recuse the members of the Court of Appeal panel comprising three Muslim judges from hearing the appeal dealing with a fatwa stating that the teachings of the appellant's husband known as Ayah Pin were deviant, see *Che Minah Remeli v. Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors* [2008] 3 CLJ 653; [2008] 5 MLJ 206 (CA). In *Che Minah*, Zaleha Zahari JCA (later FCJ) who wrote the lead judgment, said:

> In a multi-racial, multi religious society like ours, parties must be prepared to accept the panel of judges before whom the case is listed, whoever they may be, a mixed panel of differing religious faith, a wholly non-muslim panel, as well as, an all Muslim panel. To allow such an application would, in my view, be to create a dangerous precedent. **Such conduct may also be considered as shopping for judges which should not, cannot and must not be encouraged.** (emphasis added)

Test Of "Real Danger Of Bias"

[10] It is settled law that the test to be followed in a recusal application is whether there is a real danger of bias and not actual bias. In *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeals* [2006] 1 CLJ 577; [2006] 2 MLJ 293

(FC), the three members of the Federal Court wrote concurring judgments that the test for recusal laid down by the Federal Court is that set out in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 and *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701; [2002] 1 MLJ 321. In *Dato' Tan Heng Chew* (*supra*) at p. 587 (CLJ); p. 300 (MLJ) Abdul Hamid Mohamad FCJ said:

> [17] Let us look at the judgments of this court on the issue. First, the *Majlis Perbandaran Pulau Pinang*'s case where this court discussed the issue at great length, referring to numerous authorities and concluded that 'real danger of bias' test given in *R v. Gough* was to be preferred.
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> [18] The same case was referred to in the judgment of this court in *Allied Capital Sdn Bhd v. Mohamed Latiff bin Shah Mohd and another application* [2001] 2 MLJ 305. In fact that part of the judgment in *Majlis Perbandaran Pulau Pinang* that contains the statement that the court preferred the 'real danger of bias' test was reproduced. However, the judgment in *Allied Capital Sdn Bhd* did not say in so many words that the court adopted that test. My reading of the judgment is that the passage was quoted with approval.
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> [19] Then comes the case of *Mohamed Ezam bin Mohd Nor.* The appeal was heard by a five-member panel [which] delivered a single unanimous judgement. It should be noted that in that case, learned counsel for the appellant relied on *Webb v. The Queen* (1994) 68 ALJR 582, in urging the court to adopt 'the reasonable apprehension or suspicion' test. The court categorically ruled:
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> > Having considered the authorities cited and their reasoning's, we would follow Gough which is that the test to be applied in the present case is the 'real danger of bias' test.

Familial Relationship

[11] Learned counsel for the plaintiff was apprised by Justice Su that he had met the principal officer only during the wedding ceremony and reception of his niece and a Deepavali function thereafter. To Justice Su's mind, the relationship is rather distant but bearing in mind the settled principle of disclosure laid in *Locabail (UK) Ltd v. Bayfield Properties Ltd.* [2000] 1 All ER 65 (UK CA), which has been adopted with approval by our apex court, Justice Su made the disclosure.

[12] In *Locabail (UK) Ltd v. Bayfield Properties Ltd* (*supra*), the following guidance was given:

> 21. If in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. If objection is then made, it will be the duty of the judge to consider the

A objection and exercise his judgment upon it. **He would be wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance.** (emphasis added)

[13] The Right Honourable Chief Justice of our Federal Court, Tun Tengku Maimun binti Tuan Mat, had in *Dato' Sri Mohd Najib Hj Abd Razak v. PP* B *& Other Appeals (No 3)* (*supra*) at para. [9] said:

[9] In another case called *Locabail (UK) Ltd v. Bayfield Properties Ltd* [2000] 1 All ER 65, the English Court of Appeal, in considering the 'real danger of bias test', noted as follows:

C 10 ... *In any case where the judge's interest is said to derive from the interest of a spouse, partner or other family member the link must be so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from an interest of the judge himself.* (emphasis added)

[14] That the familial relationship "must be so close and direct" is in fact set out in s. 7(2) of the Judges' Code of Ethics PU (B) 201/2009 which is D reproduced below:

(2) A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

E **[15]** What is a member of the judge's family is defined in s. 3 of the Judges' Code of Ethics as including:

(a) the spouse of the judge;

(b) a son or daughter of the judge;

F (c) a son-in-law or daughter-in-law of the judge;

(d) any person who lives in the judge's household;

(e) an employee of the judge; or

(f) a close relative of the judge.

G **[16]** From the above definition, it is clear that the familial relation under discussion does not make the father-in-law of one of the Justice Su's nieces, a member of his family. Indeed, Ms Sumita Gnanarajah, learned counsel for the plaintiff, during the presentation of her closing submissions, asserted that given the disclosure made by Justice Su, they were (initially) not minded to H apply to have him recused. By this, the inference is clear, in that, the plaintiff accepts that the familial relationship under discussion, is not close but in fact, distant.

[17] Learned counsel for defendant made reference to the following cases which were helpful to support his assertion that a "distant relationship" is I not a sufficient reason for recusal. See:

i) in *Jewish Family and Child Service of Greater Toronto v JZ* [2014] OJ No 1659 (Ontario Court of Justice), the connection therein was that the judge was the step second cousin of a material witness. The applicant sought to argue that the mere fact of this 'familial relationship' is sufficient to create a reasonable apprehension of bias (a less stringent test than 'real danger of bias'). Nevertheless, the judge dismissed the recusal application and held that:

> 118 Knowing all of this, that reasonable person would inevitably conclude that the judge's connection to Ms. Shnier is highly tenuous at best – characterized only in terms of distant lineage. The connection – a step-second cousin – would be understood by the reasonable person to be merely a label, rather than a real or meaningful connection.
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> 119 That reasonable person would weigh this highly tenuous connection to the proposed witness, with the fact that judges are presumed to conduct themselves according to the highest standards of "judicial integrity and impartiality".
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> 120 That [a] reasonable person would understand that to disqualify a judge on the basis of such a tenuous connection with the resultant exorbitant waste of resources, the excessive delay in the proceedings, and the concomitant injustice to the parties – most particularly to the children – would undermine the fabric of the administration of justice.
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> 121 In my view, that reasonable person would conclude, on the basis of the foregoing, that there is no reason to be concerned about any reasonable apprehension of bias on the part of the court.; and

(ii) in *Michael Chow Keat Thye & Anor v. Suruhanjaya Sekuriti Malaysia* [2013] 10 CLJ 505, the applicant filed a recusal application on the basis that the judge was previously employed by one of the parties of the suit. In dismissing the recusal application, Justice Abang Iskandar J (now PCA) held that:

> [3] ... To my mind from that *Locabail*'s case (*supra*), it is clear that past associations including a mere past history of employment is never sufficient as valid ground to premise an objection founded on a real danger of bias on the part of the judge. In addition to that past association, there must be a clear nexus between the judge and the circumstances surrounding the making of the impugned decision before a duty to disclose arises for him to appraise the parties before him of his role in the impugned decision. In this case presently before this court, it was not only remote, there was no inkling, neither was there an iota of evidence, to even form any basis upon which any form of relationship could possibly be conjured between the judge and the first respondent of a nature which would render it capable of being construed as one that had posed a real danger

A of bias on the part of the judge such that his capacity to hear this case [becomes] wholly untenable and such that he must recuse himself accordingly. The fact of the matter is that, in my considered view, there is nothing in the whole scheme of things pertaining to this case, which would have obligated the judge to disclose to the parties of the fact that he was at one point of time in his career in
B the employment of the first respondent.

[18] The case of *Pembinaan BLT Sdn Bhd v. Debessa Development Sdn Bhd* [2014] 1 LNS 1348 which was overturned by the Court of Appeal by order made on 15 April 2015, was cited by learned counsel for the defendant to make the point that in that case, the Court of Appeal decided that a judge
C ought not to hear cases involving a protagonist-cum-defendant represented by a law firm where the judge's daughter is undertaking her pupillage. The point being made was that a judge's daughter chambering in a litigant's solicitors' firm and a judge's niece married into the family of the defendant's vice-chairman are poles apart. Besides, learned counsel for the defendant
D pointed out that *Pembinaan BLT* (*supra*) is in accord with s. 7(2) of the Judges' Code of Ethics (*supra*). However, learned counsel for the plaintiff upon her attention being drawn to the case of *Pembinaan BLT* asserted in her written submissions (encl. 61 para. 15) that the set of circumstances and facts in *Pembinaan BLT* are comparable to the case at hand. I disagree, and instead,
E I find the position taken by learned counsel for the defendant to be compelling as the familial relationship is distant, and I have no pecuniary interest in the defendant both directly or indirectly. Indeed, as mentioned, learned counsel for the plaintiff had in her oral submissions presented on 7 July 2023 toned down her pursuit of the familial relationship or connection
F point.

[19] If members of the public are made aware of the number of criminal cases where family members turned violent on each other and even commit murder, see for *eg*, *PP v. You Poh Khoon* [2022] 1 LNS 1371; [2023] 7 CLJ 1 (CA) where the son was found guilty of murder by chopping his
G father into five parts; corporate feuds involving family members, see for *eg*, *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577; disputes over distribution of inheritance with brothers pitted against each other, see for *eg*, *Ngoo Sing Chong v. Ngoo Sing Chai & Ors* [2022] 1 LNS 819; between children over properties distributed by their deceased mother during
H her lifetime, see *Low Tin Yong v. Low Yong Thuan* [2016] 5 CLJ 217; [2016] 3 MLJ 332, claim by *inter alia* son against his mother for refund of monies, see *Ho Wei Yap & Anor v. Ho Kim Ling & Anor* [2020] 1 LNS 2106 and with a special division of the High Court namely the Family Division to hear the large number of disputes on matrimonial disputes, an informed reasonable observer would be left with the distinct impression that familial relationship
I is overrated.

[20] However, Ms Sumita Gnanarajah asserted that the familial relationship point would, nevertheless, still have a bearing when the next two grounds advanced by the plaintiff in support of the recusal application are taken into account, namely that of:

(i) Justice Su wanting to see the plaintiff's representative in person; and

(ii) Justice Su having taken a keen interest in the action because immediately after his transfer to this court, and before the trial has re-commenced, he has read the file and made a comment on the matter before him.

(iv) Wanting To See The Plaintiff's Representative In Person

[21] To facilitate comprehension of this ground relied upon by the plaintiff, I reproduce the assertion made in the affidavit of Devan Nair, the CEO of the plaintiff (encl. 51 para. 15) where he deposed as follows:

> ... Semasa menghadiri Mahkamah Yang Bijaksana JC, Sumita dimaklumkan oleh jurubahasa Mahkamah bahawa learned JC ingin berjumpa dengan "klien" (iaitu saya) setelah saya kembali dari Australia sebelum memfailkan permohonan untuk menarik balik. (emphasis added)

[22] This position was taken up by learned counsel, Ms Sumita Gnanarajah in her written submissions (encl. 55 para. 16) where she asserted as follows:

> That same day, at around 4.15 p.m., Mr Wong Hock Mun appeared before the Family Court to inform Ms. Sumita who was engaged in an ongoing trial that the learned LJC wanted to see her. On attending court, **Ms. Sumita was informed by the Court interpreter that the LJC wanted to meet with the Plaintiff 'client'** upon their return from Australia before the filing of any application for recusal. (emphasis added)

[23] It was asserted by learned counsel in her written submissions that Justice Su's seeking a meeting with the "plaintiff client" before the filing of the recusal application amounted to a form of continued pressure and harassment following the plaintiff's objections both orally and in written form' which is "unprecedented, unsettling and tantamount to conduct unbecoming of an impartial' judge." (encl. 55 paras. 37 and 38).

[24] During the presentation of oral submissions on 27 July 2023, I said I do not recall seeking to meet the "plaintiff client" and asked whether it was for mediation. This is because, in court-assisted-mediation, I do see the litigants to facilitate settlement. To this, Ms Sumita Gnanarajah categorically stated in response that "no mediation was raised at all."

[25] As to who was the interpreter referred to in para. 16 of her written submissions (*supra*) who was said to have informed her of the alleged request by me to meet her client described as "plaintiff client", Ms Sumita Gnanarajah replied it was Ms Yoges.

[26] Given what was asserted by Ms Sumita Gnanarajah as against Ms Yoges, after the conclusion of the presentation of oral submissions, I had reserved my decision. This is because, one of the most fundamental principles of natural justice is *audi alteram partem* which literally means, to hear the other side. I have to check with Ms Yoges who is Ms Yogespari Krishnan, a very senior court interpreter of 23 years.

[27] Upon checking with Ms Yogespari Krishnan she denied having told Ms Sumita Gnanarajah that I had wanted to see her client. She said she told her I wanted to see lead counsel and that throughout her many years of tenure in court, she is aware that judges will only see the parties if they attend for purposes of court-assisted-mediation sessions.

[28] In the circumstances, in my considered view the apprehension of the "plaintiff client" *ie*, the plaintiff, that I had wanted to see the plaintiff's representative, as narrated above and which formed its ground for the assertion of there being a real danger of bias is baseless and misconceived.

[29] I now turn to the other ground relied upon by the plaintiff in support of its recusal application.

Judge Having Read The File

[30] At paras. 14 and 20 of Devin Nair's affidavit (encl. 51), he averred that:

> [14] I am advised and most particularly disturbed that towards the end of the case management session, the learned JC went on to inform the solicitors present that he had read and scrutinized the case file at which point he made the following statement "We may need to relook the issues. We must consider whether they ought to be remunerated based on optimism" after which the matter was adjourned.
>
> [20] In addition, I am also deeply concerned at the comment by the Learned JC at the case management session on 29/3/2023 (cited at para 14 herein) which to my mind, evidences a pre-conceived bias and pre-determination of the Plaintiffs' case before the completion of a full trial. The fact that the learned JC seems to have taken a particular interest in this case even to the extent of reading through the case file so soon after his transfer and well before trial has re-commenced coupled with his comment as referenced above causes me to doubt his purported disinterest in this civil suit.

[31] This ground is repeated in the written submissions of the plaintiff (encl. 55 paras. 45 to 47).

[32] I make no apology for having read the file before the case management of an action which I have taken over, and which has been heard in part by my predecessor. It is expected as a matter of course that judges read their files beforehand. This, judges do on a regular basis before and after regular office

hours, and during weekends. It is not uncommon that they do so even on public holidays and when they are on annual leave so as to cope with the relentless volume of case load. Without doing so, it would be very challenging to dispose of cases efficiently and promptly, and s. 7(4) and (7) of the Judges' Code of Ethics 2009 enjoins judges to dispose of all his judicial duties, fairly, efficiently, diligently and promptly and to hear and complete cases in his court and promptly write his judgments.

[33] That judges are expected to read their files was highlighted in an article which appeared in The Star on 6 February 2013 under the title "Judges must read submissions" and which was the subject matter of a defamation suit, see *Loh Mui Fah v. Dr Selvakumar Thirunavukarasu & Ors* [2015] 8 MLJ 800 at para. [4], where a senior counsel was quoted as complaining that "we get the impression that judges haven't had the time to read the actual file."

[34] When a query was posed to learned counsel for the plaintiff during the presentation of oral submissions for the recusal application that wouldn't all counsel want for judges to have read their files before hearing any matter, she said "yes, it would be excellent". This directly contradicts the position taken in writing by the plaintiff. It calls into question the *bona fides* of the recusal application.

[35] I next deal with the issue of I have commented on having to relook at the issues which apparently is causing anxiety to the plaintiff.

Judge Making A Comment

[36] At the risk of repetition, with the trial having commenced, and with Justice Ahmad bin Bache having been transferred, the matter was called up by way of case management before me to attend to its continuation. This I have done premised upon O. 34 r. 1(b) of the Rules of Court 2012 which provides *inter alia* that the court may at any time after the commencement of proceeding of its own motion make such order or directions as it thinks fit as to the future course of the action as appear best adapted to secure the just, expeditious and economic disposal of the action.

[37] It cannot be denied that the Rules of Court 2012 has brought in a new regime in the disposal of cases whereby "the progress of the case was no longer left in the hands of the litigants but with the court in the driver's seat", see *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1; [2016] 1 MLJ 301 Federal Court, at para. [18] as per Zulkifli CJ Malaya (as His Lordship then was).

[38] Having read and apprised myself of the nature of the suit, my preliminary view is that the underlying nature of the plaintiff's action is that it had proceeded to carry out works on the premise that there is a concluded contract to do so. The defendant denies there was a concluded contract and corollary to this, would be, what about the works alleged to have been

A performed. This calls into mind, the Supreme Court case of *Ayer Hitam Tin Dredging Malaysia Bhd v. Y C Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 which is often, if not invariably, cited in cases of this nature, and where Edgar Joseph Jr SCJ (later FCJ) described it as "the ever recurring question". His Lordship quoted the following passage from Robert Goff J in *British Steel*
B *Corporation v. Cleveland Bridge & Engineering Co Ltd* 24 BLR 94 (at p. 121 last para. to p. 122 para. 1):

> ... In my judgment, the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract,
> C one requested the other to commence the contract work, and the other complied with that request. If thereafter – as anticipated – a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract of which the terms can be ascertained, and the
> D law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi-contract or, as we now say, in restitution. Consistently with that solution, the party making the request may find himself liable to pay for work which he would not have had to pay for as such if the anticipated contract had come into existence,
> E *eg*, preparatory work which will, if the contract is made, be allowed for in the price of the finished work (of *William Lacey (Hounslow) Ltd. v. Davis* [1957] 1 WLR 932). This solution moreover accords with authority, *eg*, the decision in *Lacey v. Davis* (above); the decision of the Court of Appeal in the unreported case of *Sanders & Forster Ltd v. A Monk & Co. Ltd.* (6 February 1980), though that decision rested in part on a concession;
> F and the crisp dictum of Parker J in *OTM Ltd v. Hydranautics* [1981] 2 Lloyd's Rep 211 at p. 214, when he said of a letter of intent that 'its only effect would be to enable the defendants to recover on a quantum meruit for work done pursuant to the direction' contained in the letter.

[39] Comments made on the nature of the cases that come before the courts
G during case managements are not unusual. I agree with the assertion of learned counsel for the defendant that the plaintiff's contention if accepted, would mean that a judge can no longer discuss any issues in a case with the parties' counsel until the day of the decision (even though the discussion is so that the parties can focus on the material issues as identified by the judge)
H – "this is dangerous, farcical and will be detrimental to the smooth administration of justice" (see encl. 57 para. 3.11).

[40] Justice Vernon Ong JCA (later FCJ) in *Wong Kie Chie & Ors v. Kathryn Ma Wai Fong & Anor And Other Appeals* [2017] 5 CLJ 707; [2017] 3 MLJ 350 succinctly said at p. 367, para. 37 as follows:

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> Preconceived opinion by a judge did not constitute such a real bias so as to justify the recusal of the judge as the decision of the court in a pending matter would still be based and decided on the evidence and material before the court.

[41] The above statement was adopted and applied by Justice Ong Chee Kwan J in *Dato Sri Andrew Kam Tai Yeow v. Hoong Bee Yok* [2019] 1 LNS 1298 who said at para. [34] that it is not unusual for judges to make judicial comments or express preliminary views to counsel for the parties on the issues before them during case management, and that "such comments and or preliminary views can by no means suggest that the judge has 'prejudged' the issues."

[42] A similar view had earlier been expressed by Justice VT Singham J in *Residence Hotel and Resorts Sdn Bhd v. Seri Pacific Corp Sdn Bhd* [2014] 10 MLJ 413 (HC) who in finding that the recusal application was frivolous and was an abuse of the process of the court and was bordering on interference with the judicial function of a judge, said:

> (1) The Bench did not say or express any opinion on the success of the defendant's counterclaim in the event the defendant decide to proceed against the plaintiff or that the defendant will *prima facie* not succeed. The court had merely inquired whether the defendant would reconsider its position in respect of the counterclaim. However, if the defendant wished to proceed with the counterclaim, it was the defendant's right, in which case, it was a duty of the court to hear the parties and to decide on the evidence and submissions. The observation of the court as contained in the grounds of judgment did not necessarily mean that the court had made a finding on the merits of the defendant's counterclaim (see paras 19 & 20).
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> (2) In cases where any observation or ruling is required to be made by the court during the course of a trial or hearing of an interlocutory application, it cannot be taken as if the Bench has made up its judicial mind on the matter that is pending before the court. Accordingly, if the defendant's recusal application was entertained, it would be a matter of speculation of any alleged bias on the part of the Bench without any substantial basis or foundation. Further, it would place unnecessary or unwarranted restrain upon the court from requesting the parties whether through their counsels they may wish to reconsider their position taken previously when the claim or defence was filed with the view to consider an amicable settlement in view of the decision of the court in a related matter in order to save judicial time (see para 20).
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> (3) An allegation of bias or reasonable apprehension of bias is a serious allegation that calls into question the personal integrity of the judge and the integrity of the entire institution of justice. The grounds of apprehension of bias must be substantial, but however, each case must be evaluated in its own particular circumstances and in light of the whole

A proceedings. The party alleging bias has the onus of proving it. The grounds raised on the defendant's behalf in support of its application was not sufficient to recuse the Bench (see paras 24 &25).

(4) A judge's decision which does not favour a litigant cannot be used as an instrument to recuse the judge or to remove the case to another court as the opposing party's right is to file an appeal to the Court of Appeal to have the decision corrected if the losing party is not satisfied with the decision. A party who is not satisfied with the decision should not as a matter of right apply to recuse the judge in hearing other pending or related matters (see para 27).

(5) Preconceived opinion by a judge do not constitute such a real bias so as to justify the recusal of the judge as the decision of the court in a pending matter will still be based and decided on the evidence and material produced or presented before the court and not on conjecture or speculation. There must be a strong foundation or ground for supposing that the judge or judicial officer had so acted in such unjudicial fashion that he cannot be expected fairly to discharge his judicial function and duty (see para 29).

[43] In the circumstances, with respect to learned counsel for the plaintiff, in my considered view, to take issue with the comment and to rely upon it as a ground for the recusal application portrays a poor grasp of the mechanics of due process in the administration of justice in modern legal proceedings under the overarching need for cases to be disposed of justly, expeditiously and economically. Practitioners will do well to pay heed to what Justice Ong Chee Kwan J had occasion to say in *Deleum Primera Sdn Bhd v. Mazrin Ramli & Ors* [2021] 1 LNS 488, and I set out the following paragraphs *in extenso*:

[38] Our recent Court of Appeal's decision in *Wong Kie Chie & Ors v. Katheryn Ma Wai Fong & Anor and other appeals* [2017] 5 CLJ 707; [2017] 3 MLJ 350 (CA) is instructive. In this appeal, Vernon Ong JCA (as His Lordship then was) examined the English and Malaysian jurisprudence on judicial recusal.

[39] His Lordship reiterated that *the decision whether to recuse a judge from the case will depend fundamentally on the particular facts and circumstances of each case and the court should be vigilant not to allow parties to do judge-shopping by recusal of judges.*

[40] His Lordship concluded, at paragraph 41 of the judgment, by expressing that:

> [41] *Accordingly, judges should balance properly their competing duties as judges when recusal applications fall to be decided by them. Settled principles dictate that judges have a duty to sit and adjudicate on cases allotted to them, displaced only when there are objectively justifiable grounds for recusal, that litigants cannot judge-shop and judges cannot case-shop and that the administration of justice is served as much by a fearless and confident Judiciary as by a fair Judiciary (Inappropriate Recusals).*

...

[51] From the above, *it is abundantly clear that a recusal application must not be allowed too readily. This is because such application could be tantamount to a serious allegation as to the personal integrity of the judges and the integrity of the entire institution of justice ...*

[52] The seriousness of such an application cannot be overstated as Hamid Sultan J (as His Lordship then was) in *Comsa Farms** went on to state that if a recusal application is made in a cavalier manner or bad faith, it may attract the jurisprudence relating to contempt.

**Comsa Farms Bhd v. Malaysian Assurance Alliance Bhd (No. 1)* [2012] 3 CLJ 724 (HC) as per Hamid Sultan Abu Backer J (later JCA)

...

[75] A passage on this practice cited in *Ang Sue Khoon v. Majlis Bandaraya Pulau Pinang & Anor* [2016] MLJU 1342 is instructive. At paragraph 84 of the judgment, this was what is stated:

> 84.8 ... *In modern legal proceedings, a judge or adjudicator does not sit silently through a hearing, keeping his views and thoughts to himself; and expressing them, for the first time and with finality; only in his judgment The opposite is, indeed, encouraged. Most counsels appreciate being alerted to the matters, of fact or law, which may be troubling a judge during a proceeding; because they can then do their best to address the judge's concerns.* If a judge sits silently throughout a hearing, counsels will only discover for the first time what has been troubling him, when the judge's views emerge as final conclusions in his judgment; by which time it will be too late for a counsel to address the same.
>
> 84.9 ... The apex court of Australia, in *Johnson v. Johnson* [2000] 74 ALJR 1380 @ 1382, para [13]; describes the modern practice to which I have just referred, and highlights the need to take a practical view of matters in the context of ordinary judicial practice:
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> > Whilst the fictional observer ... is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgement, as inscrutable as the Sphinx ... *Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.*

A [76] In reaching that decision, reference was also made to the Australian Federal Court's decision in *Richmond River Broadcasters Pty Ltd and Another v. Australian Broadcasting Tribunal and Others* [1992] 106 ALR 671. In this case, Wilcox J expressed the advantage of judges expressing their tentative views during the proceedings to provide guidance to parties, as follows:

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> *... It is an everyday event for judges to indicate to counsel, during the course of a hearing, their impressions of a case, including their impressions of witnesses and of the facts. They do so to assist counsel. It is always an advantage for counsel to know the way in which the judge's mind is working; submissions may be targeted to the aspect of the case which is troubling the*
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> C *judge. Where a judge takes this course nobody would suggest that the judge ought then to be disqualified from concluding the case. The reason is that the judge is merely expressing a tentative view and inviting a response which he or she may take into account in determining whether to adhere to, or abandon, that view in the final decision. The readiness to listen and be persuaded is the critical matter.* (emphasis added)

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Conclusion

[44] On the particular facts of and circumstances of this case, I find that my duty to sit and adjudicate on this case allotted to me has not been displaced by the grounds advanced in the recusal application which has failed the real

E danger of bias test for the reasons narrated above. To my mind, the grounds relied upon were not only misconceived but frivolous and disrespectful. The plaintiff's recusal application (encl. 50) is without merit and is dismissed with costs fixed at RM15,000 subject to allocatur, and is to be paid personally by the solicitors for the plaintiff to the defendant.

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